NAMSDL Case Law Update

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In This Issue

This issue of the *NAMSDL Case Law Update* focuses on several recent federal and state court decisions involving defendants accused of manufacturing and/or selling novel psychoactive substances. A number of the cases encompass U.S. Courts of Appeal applying the U.S. Supreme Court's 2015 holding in *McFadden v. United States* concerning a defendant's requisite knowledge to support a conviction under the federal Analogue Act. Other cases include intermediate appellate courts in Kansas and Utah addressing challenges to state controlled substance laws. In the *Update,* cases are divided by type of court (federal or state) and then listed in approximate descending order of appellate level. In addition, state laws and courts differ in their spelling of the word analogue (analog). Each case write-up within this *Update* contains the spelling used in the respective opinion.

CASES IN THIS ISSUE

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United States v. James McKnight, U.S. Court of Appeals for the Eighth Circuit, Case No. 15-3602, October 31, 2016, 662 Fed.Appx. 479.

State of Ohio v. Hamza Shalash, Supreme Court of Ohio, Case No. 2015-1782, December 27, 2016, --- N.E.3d ---, 2016 WL 7449396.

Mike's Smoke, Cigar & Gifts v. St. George City, Court of Appeals of Utah, Case No. 20151030-CA, February 2, 2017, --- P.3d ----, 2017 WL 476282.

State of Kansas v. Yamuna Rizal, Court of Appeals of Kansas, Case No. 115,036, February 17, 2017, 2017 WL 658708.

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Federal Cases

United States v. Kimo Sims, U.S. Court of Appeals for the Ninth Circuit, Case No. 15-10450, March 7, 2017, --- F.3d ---, 2017 WL 894463. In 2015, a federal district court in Hawaii sentenced a man, Defendant, after he pled guilty to distributing methamphetamine. As part of the sentence, the district court imposed the special condition on Defendant's probation that he could not "knowingly possess, distribute, inhale, or ingest any synthetic cannabinoid, defined as a substance that mimics the effects of cannabis and applied to plant material, often referred to as 'synthetic marijuana,' 'K2,' or 'Spice,' without the prior approval of the court." Defendant objected to the condition, arguing that the condition was too vague to provide him fair notice of the prohibition. The district court rejected the argument and Defendant appealed to the U.S. Court of Appeals for the Ninth Circuit. On appeal, the Ninth Circuit affirmed the decision. Although the Ninth Circuit noted that the term "synthetic cannabinoid" is "not used in everyday conversation," it found that: (1) "synthetic" has a readily understood meaning; and (2) the district court defined "cannabinoid" in "reasonably precise language" as "any chemical compound that mimics the effects of cannabis and is applied to plant material." In reaching this conclusion, the Ninth Circuit differentiated the condition at issue here from an impermissibly vague condition in an earlier Ninth Circuit case, where a district court attempted to prohibit a defendant from using or possessing "any substance, controlled or not controlled, that you believe is intended to mimic the effect[s] of any controlled substance."

United States v. Barry Bays and Jerad Coleman, U.S. Court of Appeals for the Fifth Circuit, Case No. 15-10385, February 24, 2017, --- Fed.Appx. ----, 2017 WL 763817. Defendants, two brothers, owned and operated a business that distributed synthetic marijuana to customers in over 30 states. In 2015, a federal district court jury in Texas convicted the brothers of a number of violations of federal law, including conspiracy to distribute a controlled substance analogue. During the trial, the district court instructed the jury that, with respect to the analogue charges, the government only had to prove that Defendants knew the identity of the substance and that the substance itself, regardless of Defendant's knowledge, was a controlled substance analogue under the federal Analogue Act. Defendants appealed to the U.S. Court of Appeals for the Fifth Circuit. After the conviction, the U.S. Supreme Court issued its decision in *McFadden*, holding that in order to attain a conviction under the Analogue Act, the government must prove that a defendant knew that the substance at issue is treated as a controlled substance. On appeal, the government conceded that the district court's pre-*McFadden* jury instruction was in error. Nevertheless, the government contended that with respect to one of the Defendants, the error was "harmless" because there was "overwhelming" proof he knew he was handling controlled substance analogues. The Fifth Circuit disagreed in an unpublished decision. Observing that a jury instruction error is harmless only where it is "beyond a reasonable doubt that the jury verdict would have been the same absent the error," the court concluded that a reasonable jury might not have convicted the Defendant under the proper jury instruction. In the court's view, the government's focus at trial was that the Defendant understood the substances with which he was dealing, and that those substances were in fact analogues, but not that he knew the substances were analogues. As a result, the Ninth Circuit reversed the Analogue Act convictions and remanded the case back to the district court.

United States v. Anna Novak and John Morrison, U.S. Court of Appeals for the Seventh Circuit, Case Nos. 15–3589 and 15–3601, November 9, 2016, 841 F.3d 721. The Defendants owned a retail store in Wisconsin. In 2014, a grand jury indicted Defendants on multiple charges, including violations of the federal Analogue Act for selling certain

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products marked as "herbal incense." These products contained the novel psychoactive substances XLR–11, UR–144, PB–22, and 5F–PB–22. Defendants moved to dismiss the Analogue Act charges against them, arguing that the Analogue Act is unconstitutionally vague as applied to the substances at issue. The federal district court denied the motion and Defendants pled guilty to several charges, including the Analogue Act violations. Subsequently, Defendants appealed their convictions to the U.S. Court of Appeals for the Seventh Circuit, again challenging the constitutionality of the Analogue Act and asserting that the district court improperly accepted their guilty pleas without sufficient factual basis. On appeal, the Seventh Circuit declined to address the constitutionality issue, concluding that Defendants waived their argument by pleading guilty. As for the facts supporting the guilty pleas, the Seventh Circuit rejected Defendants' contention and affirmed the acceptance of the pleas. The court observed that under the U.S. Supreme Court's 2015 *McFadden* decision, in order to demonstrate intent under the Analogue Act, the government must prove that a defendant "knew the substance he is charged with distributing had (1) a chemical structure substantially similar to that of an already-scheduled controlled substance and (2) a physiological effect substantially similar to or greater than the effect of an already-scheduled controlled substance." In the Seventh Circuit's view, the terms of the plea agreement indicated that the government could prove facts sufficient to establish such intent. These facts included that Defendants: (1) sold XLR–11 as "herbal incense" from the back of their store; (2) learned from customers and employees that XLR–11 would give users a high; (3) believed that XLR-11 was like marijuana; and (4) posted on the store's Facebook page a warning that "[t]he federal government is banning the current herbal incense on May 13, 2013. What that means for us is everything we are selling right now will be banned as of May 13. Our inventory is limited."

United States v. James McKnight, U.S. Court of Appeals for the Eighth Circuit, Case No. 15-3602, October 31, 2016, 662 Fed.Appx. 479. In 2013, a federal jury convicted Defendant, an Arkansas man, of conspiring to possess with intent to distribute, possessing with intent to distribute, and distributing controlled substances and controlled substance analogues. Prior to the arrest, an undercover officer purchased products—referred to as potpourri—containing the novel psychoactive substances AM-2201, XLR-11, and UR-144 from the video rental store Defendant owned and operated. After the conviction, Defendant appealed to the U.S. Court of Appeals for the Eighth Circuit. Defendant argued that the evidence proven at trial was insufficient to show he possessed the required knowledge to support the convictions. On appeal, the Eighth Circuit affirmed the convictions. In its unpublished opinion, the Eighth Circuit began by stating that in cases involving a controlled substance analogue, under *McFadden* the government must show that a defendant "knew [he] was dealing with some controlled substance, regardless of whether [he] knew the identity of the substance," or by showing that the defendant "knew the specific features of the substance that make it a controlled substance analogue." In the court's opinion, the following circumstantial evidence of Defendant's actions was sufficient to establish intent: (1) "cloak-and-dagger" methods used to sell the products, such as keeping them in a back room, accepting only cash, not using the cash register, and placing the products in an empty DVD case for transport out of the store; (2) stating to his business partner that the products were "synthetic marijuana"; and (3) awareness that customers smoked the products to get high.

State Cases

State of Ohio v. Hamza Shalash, Supreme Court of Ohio, Case No. 2015-1782, December 27, 2016, --- N.E.3d ---, 2016 WL 7449396. Effective October 2011, Ohio legislators amended state controlled substance law to include a

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definition of "controlled substance analog." As part of this change, the amendments provided that "a controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I." Despite these additions, Ohio's law criminalizing drug trafficking referenced only controlled substances— and not controlled substance analogs— until December 2012. Starting in 2014, several Ohio intermediate appellate courts faced the question of whether or not state law criminalized controlled substance analogs during the time between October 2011 and December 2012. These intermediate appellate courts reached differing conclusions on the issue. As part of the above-referenced case, the Supreme Court of Ohio agreed to resolve the conflict between state appellate courts. In a ruling issued in December 2016, the Supreme Court held that Ohio criminalized controlled substance analogs as of the October 2011 amendments. In the court's view, the provision in the legislation that controlled substance analogs intended for human consumption are to be treated as schedule I controlled substances was dispositive of the question, even though the statue pertaining to trafficking did not specifically reference analogs.

Mike's Smoke, Cigar & Gifts v. St. George City, Court of Appeals of Utah, Case No. 20151030-CA, February 2, 2017, --- P.3d ----, 2017 WL 476282. The St. George (Utah) City Council held a hearing concerning a retail store's business license after an undercover operation determined that the store sold "aroma therapy" products containing the novel psychoactive substance XLR-11. State forensic lab reports concluded that XLR-11 is a structural analog of AM -694, a schedule I controlled substance. Based on these reports, the City revoked the store's license for possessing a controlled substance analog with the intent to distribute, a violation of Utah law. The store, as Plaintiff, sought judicial review of the City's action by a state trial court. Before the trial court, Plaintiff asserted that Utah's definition of a controlled substance analog (in U.C.A. § 58-37-2) is unconstitutionally vague. The state trial court upheld the Defendant's action and Plaintiff appealed. On appeal, a Utah intermediate appellate court rejected Plaintiff's argument, affirming the trial court. In its decision, the intermediate appellate court first noted that at one time, Utah's definition of controlled substance analog was in the "conjunctive" form, such that a substance was not a controlled substance analog unless it had a chemical structure similar to a controlled substance and had either: (1) an effect similar to a controlled substance; or (2) was represented to have such an effect. However, the court continued, state law was amended to read in the "disjunctive," such that now a substance is a controlled substance analog if it: (1) has a chemical structure similar to a controlled substance; (2) produces an effect similar to a controlled substance; or (3) is represented to have such an effect. Plaintiff asserted that a literal reading of amended statute would lead to "absurd" results that the state legislature could not have intended, including that substances such as tobacco, energy drinks, and MSG might qualify as controlled substance analogs. According to the Plaintiff, the amended statute must be read in the conjunctive form (similar to the old version) in order to avoid constitutional questions. In the appellate court's opinion, however, the current disjunctive definition of controlled substance analog is unambiguous as written. Accordingly, the court stated that it could not resort to the methods of statutory interpretation proposed by Plaintiff, which apply only where a statute is found to be ambiguous.

State of Kansas v. Yamuna Rizal, Court of Appeals of Kansas, Case No. 115,036, February 17, 2017, 2017 WL 658708. State prosecutors charged the Defendant, a woman who owned a gas station, with distribution of the novel psychoactive substance naphthoylindole, after police officers seized packages containing the substance from her store. A state trial court found her guilty of the charges. Defendant appealed, challenging the conviction on several grounds,

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including insufficiency of evidence showing she knew that the items seized were illegal. On appeal, Defendant asserted that under *McFadden*, the state is required to prove that she knew the synthetic cannabinoids she sold were illegal. In an unpublished opinion, the Kansas intermediate appellate court disagreed. According to the court, the analysis used by the U.S. Supreme Court in *McFadden* did not apply in this case because the Kansas statute at issue (K.S.A. § 21-5705) does not reference a required mental state, unlike the federal Controlled Substance Act. Instead, according to the court, unless the crime is one of strict liability, where a Kansas statute does not reference mental state, a defendant's mental state "may be established by proof that the conduct of the accused person was committed 'intentionally,' 'knowingly' or 'recklessly.'" In the court's view, therefore, Defendant's knowledge requirements applied only to her conduct, and "nothing in the Kansas statutes suggests that [Defendant] needed knowledge of the specific drug she was distributing." Nevertheless, the appellate court added that even under a *McFadden*-type analysis, several factors supported the conclusion that Defendant knew she was selling an illegal drug. These factors included that Defendant: (1) concealed the products under the countertop rather than displaying them openly; (2) told law enforcement that "incense" is illegal but also that customers seeking the packets below the counter would ask for incense; and (3) told law enforcement that she stopped selling the packages because they were illegal, but later admitted that she still sold them.

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